

1 MEMORANDUM

2 TO: Advisory Committee on Acoustic Impacts on Marine Mammals

3 FROM: David Cottingham

4 DATE: 9 September 2005

5 SUBJECT: Response to 6 September conference call

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7 The Commission was encouraged by the participation of nearly all Advisory Committee
8 members on the 6 September conference call. However, the Commission shares with all
9 Committee members a deep disappointment that, notwithstanding the good faith efforts on the
10 part of all the members, the Committee has not reached meaningful consensus. We urge the
11 Committee to use the upcoming 12 September conference call to agree upon a strategy to bring
12 the Advisory Committee process to a close, and we reiterate below our proposal for this closure.

13
14 The conference call identified three action items to which Committee members needed to
15 respond:

- 16 a. their suggestions and concerns regarding the process of developing individual,
17 caucus, and/or cross-caucus statements;
18 b. the potential areas on which they think the Advisory Committee may be able to
19 reach agreement; and
20 c. their suggestions for how we use the time in the September meeting.

21
22 The following are the Commission's responses.

23
24 **A. Suggestions and concerns regarding the process of developing individual, caucus, or**
25 **cross-caucus (non-consensus) statements**

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27 The Commission remains open to discussion of our proposal and ways to implement it.

28
29 We note the following statement from the Advisory Committee's Operating Procedures:

30 The Committee's charge is to develop recommendations to the Commission for inclusion
31 in a report to Congress from the Commission. The Commission asks the Committee to
32 develop as much consensus on these recommendations as is achievable. On issues where
33 the Committee does not or cannot reach consensus, this will be noted and the
34 Commission may develop, if it so chooses, its own recommendations to Congress on
35 those issues.

36
37 The Commission identifies the following topics as potentially meriting discussion in the
38 proposed individual, caucus, and cross-caucus statements:

- 39 • Key areas of scientific agreement and uncertainty/disagreement regarding the impacts of
40 human-generated sound on marine mammals and the ecosystems on which they depend,
41 including views on:
42 ○ The degree of current scientific uncertainty,
43 ○ The extent of the problem,
44 ○ The relative significance of anthropogenic sound among other threats to marine
45 mammals, and
46 ○ Useful sources of information (e.g., NRC reports).

- Identification and prioritization of research in critical areas to resolve uncertainties or disagreements and improve management/mitigation.
- Discussion of key issues related to research, including views on:
 - Animal welfare ethics considerations for directed marine mammal research such as CEEs and ABR experiments,
 - Research permitting/authorization concerns, and
 - Research funding concerns.
- Recommended management actions and strategies to help avoid or mitigate possible adverse effects of anthropogenic sounds on marine mammals and other components of the marine environment, including discussion of:
 - Assessment of the effectiveness of current management and mitigation approaches (e.g., permitting and authorization),
 - The relative importance of mitigation versus research efforts,
 - Views on cost effectiveness, practicality/practicability, burden of proof, and balancing other interests,
 - Approaches to management in the face of scientific uncertainty (e.g., views on precautionary approaches), and
 - Views on international/multi-lateral approaches and cooperation.

We propose the following “ground rules” for these statements, as a starting point for discussion:

- Development of individual, caucus, and multi-caucus statements should begin as soon as possible.
- Maximum 30 pages total length per statement (including references).
- After the ground rules are agreed upon, the Commission and facilitators will not participate in the development of these statements; development is the responsibility of the author(s).
- Statements will refrain from characterizing the views and positions of other Committee members.
- Statements will be consistent with the agreed Advisory Committee Operating Procedures and responsive to the charge set forth in the Advisory Committee’s charter.
- Authors may provide drafts of their statements to other members of the Advisory Committee, but are not obligated to do so.
- Final statements will be due to the Marine Mammal Commission no later than COB Monday, 31 October 2005.

B. Potential areas on which Advisory Committee may be able to reach agreement

We would first like to clarify that the goal for this exercise must still be consensus—that is, “all members can live with the results.” Thus, we interpret this action item as a request for the identification of areas where the entire Advisory Committee may be able to reach consensus, not simply where some members (whether a majority or not) are able to reach agreement within or among caucuses. The Commission undertook the FACA process in hopes of fostering information sharing, dialogue, and most importantly, agreement on recommendations for how to reduce acoustic “threats” to marine mammals. The Advisory Committee was therefore structured on a basis of consensus—we wanted to know where common ground exists or might be developed, not just to identify the individual views of the various stakeholders. Where

1 consensus could not be reached, we agreed to acknowledge the lack of agreement with due
2 consideration of the need for full, fair, and equitable treatment of all perspectives on any issue.

3
4 The Commission remains skeptical about the possibility of the Advisory Committee reaching
5 consensus on substantive issues. At the heart of this problem, we believe, is the considerable
6 scientific uncertainty about the nature and extent of threats to marine mammals from
7 anthropogenic sound. There are fundamental disagreements about how to interpret and respond
8 to this uncertainty.

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10 In order to provide useful, meaningful recommendations to Congress on this subject, the
11 Advisory Committee as a whole would need to provide (a) clear, compelling rationale for the
12 recommended actions, and (b) a clear path forward. Because of the disagreements that exist over
13 such fundamental issues as the extent of the problem and appropriate level of concern, the
14 Commission believes that the Advisory Committee will not be able to reach consensus on
15 meaningful recommendations for Congress.

16
17 We are opposed to the pursuit of “majority” and “minority” reports as such. If multiple members
18 of the Committee agree upon particular findings or recommendations, we encourage them to
19 state that in the non-consensus statements to be attached to the Commission’s proposal (see Step
20 2 of the proposal, below).

21 22 **C. Suggestions for how to use 20-22 September meeting**

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24 At this time the Commission believes that holding the sixth plenary meeting would be of limited
25 value. The Commission intends to maintain faith with the processes and procedures agreed to by
26 the Committee members. We appreciate all the time and energy people have invested to date,
27 and are concerned that the 20-22 September meeting has a high probability of encumbering
28 several more days of busy people's time without moving the process forward in a productive or
29 useful way. The meeting’s stated purpose was to allow for final negotiations on a consensus
30 report of the Advisory Committee. This purpose seems to have been obviated, as evidenced by
31 the discussions on the 6 September conference call and the comments on the 5 August draft
32 report. With respect to the chief goal of the Advisory Committee—to reach consensus on
33 recommendations—the Commission feels that we may have come as far as we can. Holding the
34 meeting has the potential to lead to further polarization, and counteract the spirit of collaboration
35 with which we entered into the FACA process. It seems likely that the same, or better, results
36 could be achieved through conference calls and emails, rather than an in-person, public meeting
37 for which time to prepare is now extremely limited.

38
39 We remain open to discussing whether to hold the September meeting. If, on the 12 September
40 conference call, Committee members are able to provide compelling reasons why the benefits of
41 holding the meeting would outweigh the costs and risks, and are able to reach consensus on a set
42 of attainable goals, an agenda, and ground rules, the Commission is willing to sponsor the
43 plenary meeting. To be considered compelling, the arguments provided in favor of holding the
44 meeting must (a) demonstrate clear benefits to the Advisory Committee process, (b) explain why
45 an in-person meeting is needed, (c) provide specific issues to be negotiated, and (d) clearly
46 describe attainable goals for the meeting’s outcome.

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2 The Commission notes that the 6 September conference call became heated and accusatory in
3 ways that were not productive or consistent with our ground rules. If the Committee agrees to
4 proceed with the 20-22 September meeting, but the meeting develops along such
5 counterproductive lines, the Commission will terminate the meeting immediately, as is consistent
6 with the provisions of the Federal Advisory Committee Act. The Committee must focus on
7 positive, forward progress, and the Commission will act to avoid exacerbating this already
8 difficult conflict.

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10 If the Committee cannot agree to a set of attainable goals, an agenda, and ground rules for the
11 meeting during the 12 September conference call, we will not hold the meeting. In either case,
12 we will continue to encourage the Committee to come to agreement on means to proceed with
13 implementing the Commission's proposal for bringing the process to a close, as restated below
14 (*new clarifications in italics*):

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16 Step 1. The Commission, with assistance from the facilitators, would prepare a short
17 summary of the Advisory Committee process, explaining that we brought people with
18 diverse interests together to engage in dialogue and develop recommendations endorsed
19 by all stakeholders regarding how best to proceed to address potential effects of noise on
20 marine mammals. This summary would note that Committee members remained divided
21 on most key *issues even after extensive deliberation, but would not make any substantive*
22 *statements about the issues.* Committee members would be given an opportunity to
23 comment on a draft, which the Commission and facilitators would revise accordingly.
24 *This summary could be negotiated by phone and email, and draft text might be drawn*
25 *from parts of the existing Introduction of the 5 August draft report. Together with the*
26 *statements described in Step 2, this would constitute the Advisory Committee report to the*
27 *Commission.*

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29 Step 2. Members of the Committee would have an opportunity to provide to the
30 Commission individual, caucus, or cross-caucus (*non-consensus*) statements that express
31 their perspectives on the issues the group discussed in response to the Advisory
32 Committee's charter. The full Committee would first discuss and agree on rules
33 governing the preparation of these statements (*e.g., page limits; range of topics; deadline*
34 *for receipt*). *These rules could be negotiated by phone and email (the Commission's*
35 *preliminary suggestions for ground rules are described in section B above).* The *non-*
36 *consensus* statements would be submitted to the Commission by the end of October and
37 be forwarded, without change, to Congress as part of the Commission's report. *Together*
38 *with the process summary described in Step 1, these statements would constitute the*
39 *Advisory Committee's report to the Commission.*

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41 Step 3. The Commission would prepare a report to Congress in response to its charge.
42 *The report will likely focus on (a) the review and evaluation of available information*
43 *(survey of acoustic threats to marine mammals), (b) recommendations regarding*
44 *research priorities, and (c) recommendations regarding management actions and*
45 *strategies to help avoid and mitigate possible adverse effects of anthropogenic sound on*
46 *marine mammals and the marine environment. The Commission will strive to reflect the*

1 *work of the Advisory Committee in a neutral manner (e.g., by referring to the attached*
2 *non-consensus statements) in providing the Commission's views on the subject. Our*
3 *report to Congress would append all individual/caucus statements received by the*
4 *deadline (Step 2), as well as the summary of the process described in Step 1 above.*
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6 Step 4: The Committee members would receive the Commission's submitted report
7 *(with the Advisory Committee's report—Step 1 summary and Step 2 statements—*
8 *appended) upon its transmittal to Congress. Committee members would retain the*
9 *option, if they wish, of submitting their own, separate reports to Congress. Any such*
10 *reports would not be part of the Commission's process, and would be independent of the*
11 *Advisory Committee's report to the Commission and the Commission's report to*
12 *Congress.*